

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RORY ROBY,)	
)	
Claimant,)	IC 2002-011476
)	
v.)	
)	
CHESTER BARNETT,)	ORDER DENYING
)	RECONSIDERATION
Employer,)	
)	
and)	
)	filed March 18, 2008
ASSOCIATED LOGGERS EXCHANGE,)	
)	
Surety,)	
Defendants.)	
)	

On January 11, 2008, Defendants timely filed, pursuant to Idaho Code § 72-718, a motion and supporting memorandum to reconsider the Commission's Order dated December 24, 2007. Claimant responded on January 17, 2008. On January 25, 2008, Defendants filed a reply.

In their motion, Defendants request the Commission to reconsider the issues of causation, TTDs, and PPI. Defendants assert that the Commission shifted the burden of proof regarding causation from Claimant to Defendants. Instead of relying on Claimant to prove the injury was caused by the industrial accident, Defendants assert that the Commission relied on Claimant's self proposed bad memory instead of relying on the medical records. Furthermore, Defendants allege that a deer hunting accident clearly broke the chain of causation. Defendants also argue that awarding TTDs beyond Claimant's return to work on January 24, 2006 was improper based on the *Malueg* factors, that Claimant had a seasonal job and was receiving benefits for periods he usually did not work, and that he found a higher paying job doing essentially the same work. Lastly, Defendants contend that the evidence in the record does not support the PPI award.

While Defendants acknowledge the Commission's right to determine PPI under *Urry v. Walker & Fox Masonry*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989), Defendants believe the Commission failed to follow the mandatory evaluation of factors in Idaho Code § 72-424.

In response, Claimant contends that the decision is supported by competent and substantial evidence, even though conflicting medical evidence is present. Specifically regarding the TTDs, Claimant notes that the Defendants do not dispute that Claimant was in a period of recovery. Claimant maintains that the Commission has followed the *Malueg* factors while Claimant was in a period of recovery, therefore Defendants were required to show that a reasonable offer for employment has been made or that employment is generally available in the market. As such, Claimant believes the decision should stand as written.

In their request, Defendants skillfully raise issues cloaked as legal arguments but, in reality, essentially ask the Commission to re-evaluate the evidence. "It is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on [his] Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 388, 128 P.3d 920, 925, (2005). Here, Defendants reference facts and arguments already presented, examined, and considered in the initial action. The record supports the Commission's decision. As such, there is no justification to warrant a reconsideration of the order. However, because of the complexity of the case, each of Defendants' points of reconsideration are discussed below.

Shifting of Burden of Proof

Defendants maintain the Commission's decision improperly shifted the burden of proof to Defendants to prove Claimant's need for cervical surgery was not caused by the industrial accident. A claimant has the burden of proving to a reasonable degree of medical probability

that his or her injury was caused by an industrial accident. *Gooby v. Lake Shore Mgmt. Co.*, 136 Idaho 79, 29 P.3d 390 (2001). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

Defendants' allegations are without merit. While there is conflicting medical evidence and serious suspicion surrounding Claimant's condition, Claimant provided the necessary and mandated medical testimony of at least two doctors establishing causation on a more probable than not basis. Defendants' arguments that the two doctors had incomplete medical records and that, specifically, medical notes were riddled with inconsistencies concerning the location of the neck pain are not persuasive. Defendants had the opportunity to correct any such error or inquire about the inconsistencies during both doctors' depositions. Even provided with additional medical information, and as noted by the Referee in his decision, both doctors reaffirmed their opinion that Claimant's need for surgery was caused by the 2002 industrial accident on a more probable than not basis.

It is critical to note that Defendants failed to supply their own doctor to attest to other causes of the injury. Instead, Defendants relied on the ambiguity of Claimant's IME to support their position, who opined at times that Claimant's injury was caused by the industrial accident and at other times declared the industrial accident did not "absolutely" cause the injury.

Decision pp. 10, 23.

Although it is incumbent on a claimant to establish the right to compensation by a preponderance of the evidence, it is not necessary that the cause of the injury relied on be proven to the exclusion of other possible causes. *Suren v. Sunshine Mining Company*, 70 P. 2d 399, 403 (1937); *Jensen v. City of Pocatello*, 18 P.3d 211, 135 Idaho 406 (2000). Though there may be discrepancies concerning location of injuries, imprecise medical history presented by

Claimant, and a conspicuous hunting trip, the Commission relies heavily on those best suited to make a determination regarding causation, the doctors. Further, the Commission, as the fact finder, is free to determine the weight to be given to the testimony of a medical expert. *Lorca-Merono v. Yokes Wash. Foods, Inc.*, 137 Idaho 446, 50 P.3d 461 (2002). In this case, the overwhelming medical opinions show that Claimant's need for surgery was caused by the industrial accident. The record reflects an exhaustive review of all the medical evidence and testimony by the Referee who clearly articulated his findings and determined the opinions of Dr. Harper and Dr. Dirks persuasive. The Referee's determination that "Claimant has proven that his cervical surgery was related to his 2002 industrial accident" is fully supported by the record. Decision pp. 12, 26.

TTD Award

Defendants allege that the Commission erred in awarding Claimant TTDs beyond his return to work on January 24, 2006. According to Idaho Code § 72-408, Claimant is entitled to income benefits for total temporary disability during a period of recovery. A period of recovery ends when the worker is medically stable. *Hernandez v. Phillips*, 141 Idaho 779, 118 P.3d 111 (2005). Once Claimant has shown they are in a period of recovery, the *Malueg* factors apply. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791-92, 727 P.2d 1217, 1219-20 (1986).

Defendants failed to argue TTDs in their post hearing brief. Now, however, Defendants contend that TTDs should stop as of February 21, 2006 because Claimant returned to work, earned a higher salary and the work ceased due only to spring break up. Regardless of these arguments, the fact remains that Defendants are still responsible for TTD payments through May 1, 2006. Claimant was in a period of recovery from August 31, 2005 through September 2006. He received a light duty release to work on November 22, 2005. Defendants concede

these points. Once Claimant is in a period of recovery and has a release, it is Defendants' onus to provide Claimant a reasonable and legitimate offer of employment appropriate for his light duty release that continues through his period of recovery. Defendants failed to do so. Decision pp. 20, 29. Therefore, Defendants retain their obligation to pay Claimant TTDs while he is in a period of recovery and has a light duty work release. Though Claimant was technically in a period of recovery until September, Claimant retained employment within his restrictions and, in accordance with the *Malueg* factors, the Referee cut off TTDs on that date, May 1, 2006. Decision pp. 20, 29. Therefore, the Referee's decision appropriately considered and evaluated the *Malueg* factors and his determination is fully supported by the record.

PPI

Defendants acknowledge the Commission's discretion when determining PPI. However, Defendants contend that the Commission failed to follow the mandatory evaluation of factors in Idaho Code § 72-424. This statute was considered and quoted by the Referee in his decision. Decision pp. 13, 31. The statute, briefly stated, requires PPI ratings to be a medical appraisal taking into account a list of daily living factors. As such, the factors are inherent in making a PPI rating. Further, the AMA Guidelines, 5th Edition, state that their recommended whole person impairment ratings "estimate the impact of the impairment on the individuals overall ability to perform activities of daily living," such as self care, communication, physical activity, travel, sleep, etc. *AMA Guides to the Evaluation of Permanent Impairment*, Fifth Edition Chpt. 1, p. 4. While the Referee did not specifically address each factor individually, he did proceed to evaluate the medical appraisal of Dr. McNulty's PPI rating, for which Dr. McNulty used the AMA Guides. In doing so, the Referee methodically analyzed and determined the validity of the

rating. As such, he inherently applied the statutory factors required to make such a rating and satisfy Idaho Code § 72-424.

Based upon the foregoing reasons, Defendants' Motion for Reconsideration should be, and is hereby, DENIED.

DATED this _18th_ day of _March_____2008.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

_____/s/_____
R.D. Maynard, Commissioner

Participated but did not sign
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this ___18th___ day of ___March_____2008, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

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_____/s/_____